

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

03/12/2002

CLERK OF THE COURT  
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza  
Deputy

LC 2001-000320

FILED: \_\_\_\_\_

STATE OF ARIZONA

F TYLER RICH

v.

JUDY ANN FENN

GENE R STRATFORD

PHX CITY MUNICIPAL COURT  
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #5948697

Charge: 1. DUI-ALCOHOL  
2. DUI W/AC OF .10 OR HIGHER  
3. EXTREME DUI

DOB: 03/16/58

DOC: 09/07/00

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

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This matter has been under advisement since Oral Argument on March 6, 2002, and the Court has considered and reviewed the record of the proceedings from the Phoenix City Court, and the Memoranda submitted by counsel.

The only issue raised by Appellant concerns the trial judge's denial of Appellant's Motion for Judgment of Acquittal pursuant to Rule 20, Arizona Rules of Criminal Procedure. A judgment of acquittal is only required when there is no "substantial evidence to warrant a conviction"<sup>1</sup> When reviewing the sufficiency of the evidence, an appellate court must not reweigh the evidence to determine if it would reach the same conclusion as the original trier of fact.<sup>2</sup> Evidence should be viewed in a light most favorable to sustaining a conviction and all reasonable inferences will be resolved against the Defendant.<sup>3</sup> If there are conflicts in the evidence, an appellate court must resolve such conflicts in favor of sustaining the verdict and against the Defendant.<sup>4</sup> The Arizona Supreme Court has explained in State v. Tison<sup>5</sup> that "substantial evidence" means:

More than a scintilla and is such proof  
that a reasonable mind would employ to  
support the conclusion reached. It is of  
a character which would convince an  
unprejudiced thinking mind of the truth of  
the fact to which evidence is directed.  
If reasonable men may fairly differ as to  
whether certain evidence establishes

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<sup>1</sup> State v. Doss, 192 Ariz. 408, 966 P.2d 1012 (App. 1998).

<sup>2</sup> State v. Guerra, 161 Ariz. 289, 778 P.2d 1185 (1989); State v. Mincey, 141 Ariz. 425, 687 P.2d 1180, cert.denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); State v. Brown, 125 Ariz. 160, 608 P.2d 299 (1980).

<sup>3</sup> State v. Guerra, supra; State v. Tison, 129 Ariz. 546, 633 P.2d 355 (1981), cert.denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d (1982).

<sup>4</sup> In Re: Estate of Shumway, 197 Ariz. 57 3 P.3d 977, review granted in part, opinion vacated in part 9 P.3d 1062; Ryder v. Leach, 3 Ariz. 129, 77 P.490 (1889).

<sup>5</sup> Supra.

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a fact in issue, then such evidence must be considered as substantial.<sup>6</sup>

The trial judge recognized and cited to counsel the controlling authority on the definition of "actual physical control": the Arizona Supreme Court case of State v. Love.<sup>7</sup> In that case the Arizona Supreme Court adopted a "totality of the circumstances" approach that:

...recognizes that each situation may be different and requires the fact finder to waive the myriad of circumstances in fairly assessing whether a driver relinquished control and no longer presented a danger to himself or others.<sup>8</sup>

The Arizona Supreme Court reasoned that unlike the test in State v. Zavala<sup>9</sup>;

The totality of approach permits drunk driver's to be prosecuted under a much greater of variety of situations- - for example, even when the vehicle is off the road with the engine not running. The drunk who turns off the key but remains behind the wheel is just as able to take command of the car and drive away, if so inclined, as the one who leaves the engine on. ...under a totality analysis, the motorist will not receive automatic absolution with such a flick of the wrist but can still be found in "actual physical control" of the vehicle.<sup>10</sup>

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<sup>6</sup> Id. at 533, 633 P.2d at 362.

<sup>7</sup> 182 Ariz. 324, 897 P.2d 626 (1995).

<sup>8</sup> 182 Ariz. at 327, 897 P.2d at 629.

<sup>9</sup> 136 Ariz. 356, 666 P.2d 456 (1983).

<sup>10</sup> State v. Love, 182 Ariz. at 327, 897 P.2d at 629.

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And, the Arizona Supreme Court held:

We hold that whether a driver had actual physical control is a question for the fact finder and should be based upon consideration of all the circumstances.<sup>11</sup>

In this case, Appellant complains that there was no "substantial evidence" that he was in "actual physical control" of her vehicle at the time of her arrest. Central to Appellant's defense was the fact that her automobile was parked in a parking space off the roadway. Were there no other evidence indicating an intention to drive the automobile, Appellant's case would be similar to that in State ex rel McDougall v. Superior Court<sup>12</sup> cited by the Arizona Supreme Court in State v. Love<sup>13</sup> as "the Defendant had not driven his car, had no intention of doing so, and had turned the ignition on because it was cold and he turned the heater on."<sup>14</sup>

There was evidence in this case that Appellant intended to drive her automobile. Charlene Hiller, an employee of the Cheyenne Saloon, testified that on September 7, 2000 Appellant came into the bar and drank two mixed drinks at the bar.<sup>15</sup> Appellant appeared to act as though she had passed out or was getting ready to pass out and was intoxicated.<sup>16</sup> Ms. Hiller offered to call Appellant a cab, and Appellant said, "No. I'm just going to go home. I've got my own car."<sup>17</sup> At the time of Appellant's arrest Phoenix Police Officer Eric Wyckoff testified that he observed Appellant's automobile running with the windows rolled up.<sup>18</sup> Appellant was seated in the driver's seat but her

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<sup>11</sup> Id., 182 Ariz. at 328, 897 P.2d at 630.

<sup>12</sup> 173 Ariz. 582, 845 P.2d 508 (App. 1992).

<sup>13</sup> Supra.

<sup>14</sup> State v. Love, 182 Ariz. at 326, 897 P.2d at 628.

<sup>15</sup> R.T. of March 22, 2001 at pages 28-31.

<sup>16</sup> Id. at page 31.

<sup>17</sup> Id.

<sup>18</sup> R.T. of March 22, 2001 at pages 48-50.

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head was resting on the center console and she appeared to be passed out. Her right foot was on the brake pedal and Appellant's car was the type of automobile that required one's foot to be on the brake before moving it from park into drive.<sup>19</sup> At the time of her arrest Appellant made an astonishing admission, "Yes, yes, yes, arrest me. I deserve this."<sup>20</sup> These facts clearly furnished the basis for "substantial evidence" to indicate that Appellant was in "actual physical control" of her automobile at the time of her arrest. The trial judge did not err in denying Appellant's Motion for a Judgment of Acquittal pursuant to Rule 20, Arizona Rules of Criminal Procedure.

IT IS THEREFORE ORDERED affirming the judgments of guilt and sentences imposed by the Phoenix City Court.

IT IS FUTHER ORDERED remanding this matter back to the Phoenix City Court for all further and future proceedings in this case.

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<sup>19</sup> Id. at pages 51-52.

<sup>20</sup> Id. at page 56.